Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVE J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, et al.,

Petitioners,

v.

PWG PARTNERSHIP, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

PETITION FOR A WRIT OF CERTIORARI

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156 pp

QUESTIONS FOR REVIEW

1. Whether a state court has jurisdiction, or power, to divest the United States of its title to oil in place under federal lands and vest the title in a trespasser?

2. Whether a state court has jurisdiction, or power, to determine that a trespasser has exclusive possession of oil in place under federal lands to the ouster of a Unit Operator and a lessee of a federal oil and gas lease covering the oil?

3. Whether the errors of the New Mexico state courts in this case are so unfair as to arbitrarily deprive Roseline Abraham of her property rights in violation of her right to due process under the Fourteenth Amendment to the Constitution of the United States?

LIST OF PARTIES

A. Petitioners:

1. Steve J. Abraham as Personal Representative of the Estate of Roseline Abraham, Deceased;

2. Michael C. Abraham,

3. Steve J. Abraham, and

4. Diane Abraham Hinkle, surviving children of Mike and Roseline Abraham.

B. Respondents:

1. PWG Partnership, a New Mexico partnership composed of Frank D. Gorham of Albuquerque, New Mexico, and William G. Webb of Dallas, Texas;

2. Prudential Bache Production, Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production Partnership IIP-11, Prudential-Bache Energy Income Production Partnership IIP-12, Prudential-Bache Energy Income Production Partnership IIP-13, Prudential-Bache Energy Income Production Partnership IIP-14, Prudential-Bache Energy Income Production Partnership IIP-15, Prudential-Bache Energy Income Production Partnership IIP-16, Prudential-Bache Energy

Income Production Partnership IIP-17, and Graham Royalty, Ltd., Petitioners have no inkling of the makeup of this group;

3. El Paso Natural Gas Company, a Delaware corporation, a Plaintiff who filed this case; at that time a wholly owned subsidiary of Burlington Industries and perhaps Burlington Railroad;

4. El Paso Production Company, a Plaintiff; at the time - a wholly owned subsidiary of El Paso Natural Gas Company; and

5. Meridian Oil Inc., an intervenor in the case - at the time a wholly owned subsidiary of Burlington Industries, Inc. Meridian was an affiliate of El Paso Natural and El Paso Production. Meridian eventually took total charge of running the operation of oil and gas leases formerly owned by El Paso Natural and/or El Paso Production.

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v.

PWG PARTNERSHIP, et al,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

Petitioners, Steve J. Abraham, Personal Representative of the Estate of Roseline Abraham, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Mexico filed on December 1, 1993.

OPINIONS BELOW

The majority opinion for the Supreme Court of New Mexico written by C. J. Ransom, joined by J. Baca and J. Frost, is reported at 866 P 2d 311 (entitled El Paso Production Co., et al v. PWG Partnership, et al) and is reprinted in the Appendix ("App.") accompanying this petition at pages A1-48. A dissenting opinion was filed by J. Franchini (A48-57).

Petitioners' Motion for Rehearing was denied on January 3, 1994 and is reprinted at App. B1-3.

The trial court signed a Stipulated Final Judgment on Accounting Phase on September 18, 1991 (reprinted in App. C1-7) shortly after signing of the Judgment on Ownership Phase on September 18, 1991, (reprinted in App. D1-14).

The trial court filed a Decision (containing Findings of Fact and Conclusions of Law) on August 20, 1991 (pertinent excerpts are reprinted in App. E1-6).

JURISDICTION

1. Date of the entry of judgment sought to be reviewed - December 1, 1993;
2. Date of Order Denying Petitioners' Motion for Rehearing - January 3, 1994;
3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, and pursuant to the Property and Supremacy Clauses, and the due process clause in the Fourteenth Amendment to the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

A. U.S. Constitutional Provisions:

1. Art. IV. § 3, Cl. 2 (The Property Clause):

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

2. Art. VI, § 2:

> "The Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby . . ."

3. The Fourteenth Amendment to the Constitution:

> Article XIV, § 1: ". . . nor shall any state deprive any person of . . . property, without due process of law; . . ."

B. Statutes:

1. 30 U.S.C. § 181 (The Mineral Leasing Act of 1920, as amended): (App. F1)

2. 30 U.S.C. § 189 (App. F1)

3. 30 U.S.C. § 226 (j) (App. F2-8)

C. Regulations

43 C.F.R. 3186.1 (formerly in 43 C.F.R. 192.20 and 192.21 (App. F8-12)

STATEMENT OF THE CASE

This is a case where a widowed homemaker's multi-hundred-million-dollar property rights were wrongfully taken from her by application of the archaic, little-used common law doctrine of presumed grant.

Mike Abraham and wife, Roseline, of Albuquerque, New Mexico, ("Seller"), and El Paso Natural Gas Company, ("El Paso"), as buyer, made a written contract dated

September 19, 1952 (commonly known as "GLA-59"). Sellers sold their gas rights in eight (8) federal oil and gas leases issued by the United States (federal leases), to El Paso, reserving (1) the oil rights, and (2) the rights to liquid hydrocarbons. In addition to the cash consideration paid for the gas rights, El Paso granted Mike and Roseline Abraham an option to repurchase for $25,000.00 the entire interest upon El Paso's producing a certain amount of gas from the federal leases (App. A4).

A. The gas rights in the following federal leases were sold in GLA-59:

SF 079380	SF 079002
SF 079381	SF 079012
SF 079382	SF 080713
SF 079383	SF 080714

All of the leases were placed in federally-approved units, under federally-approved

Unit Operators who are in exclusive possession of all operations under the supervision of U.S. personnel.

B. On June 1, 1963, Mike and Roseline Abraham assigned their oil and liquids rights in SF079002, SF079012, SF080713B, SF080714A, NM012292, and NM012735 to Rincon Oil and Gas Corporation ("Rincon"). (App. E2-3 [20]; A6).

1. Mike and Roseline Abraham did not mention the option to repurchase the entire interest for $25,000.00, or their remaining interests in leases SF079380, SF079381, SF079382, and SF079383 in the conveyance. (App. A6-7; E3-4).

2. The New Mexico Supreme Court found that Mike and Roseline "agreed to sell" all of these unmentioned interests to Rincon even though they

did not document the transfer (App. A13), and used the doctrine of presumed grant to take the valuable option and the four leasehold interests from Roseline Abraham.

C. An involuntary bankruptcy proceeding (under the Bankruptcy Act of 1898) was filed against Mike Abraham in September 1964, in Dallas, Texas. (App. A7) Roseline Abraham was never a party to the bankruptcy. (App. E3) In submitting a proposed plan for an arrangement with unsecured creditors, Mike Abraham mistakenly stated that Rincon owned the option to repurchase and SF079380, SF079381, SF079382, SF079383. That plan was never acted on or adopted. (App. A8)

D. PWG Partnership ("PWG") purchased Rincon's properties in September 1973, with both a specific listing of leases and a

"global" conveyance. (App. A13-14; G-1-2). The description of the transferred assets failed to mention the option to repurchase (App. G1-2), and there was no documentation of any transfer of the option or of the above four federal leasehold interests. (App. A15)

E. Mike Abraham died intestate on September 1, 1985.

F. The time to exercise the option matured on January 15, 1989. (App. C4)

G. Roseline Abraham exercised her option to repurchase in October 1989, in writing, and tendered the option price in a certified check for $25,000.00, which El Paso negotiated.

> "On or about October 13, 1989, a twenty-five thousand dollar check was tendered on behalf of Roseline Abraham to El Paso. The check was deposited by routine clerical procedures, but upon discovery of the error, El Paso tendered back to Roseline Abraham's representative a check in the same

amount in return, which was deposited and cashed." (Excerpt from Statement of Undisputed Facts).

H. The trial court found that the oil rights, the right to liquid hydrocarbons, and the option to repurchase are each a separate property right. (App. E2) The New Mexico Supreme Court in affirming the decision of the trial court, wrote, "Beginning in 1976, El Paso Natural Gas began paying PWG for liquid hydrocarbons extracted from gas under the GLA-59 leases," and affirmed the finding of the trial court that such payments constituted exclusive possession by PWG of all three separate rights, i.e. the oil, the liquid hydrocarbons, and the option to repurchase. (App. E4 #4)

I. After perfecting her appeal to the Supreme Court of New Mexico, Roseline Abraham died on March 7, 1992. Steve J.

Abraham, Personal Representative of her Estate, and her three surviving children (Michael C. Abraham, Steve J. Abraham and Diane Abraham Hinkle) were substituted as Appellants in the Supreme Court of New Mexico.

ERRORS PRESERVED BY PETITIONERS

Lack of jurisdiction can be asserted at any time.

In their Motion for Rehearing filed with the Supreme Court of New Mexico, Petitioners stated the following grounds:

> "A. In adopting the presumed grant theory as a rule of law in this case, the opinion has overlooked Roseline Abraham's constitutional rights and her statutory rights. The opinion has divested her of property based upon her husbands separate actions, and without her having due process in his personal bankruptcy court proceedings."
>
> "D. By its opinion adopting the doctrine of presumed grant this Court has created an issue which may conflict with paramount federal law and would require reversal on

> jurisdictional grounds or a remand to consider facts and briefing relative to federal jurisdiction. This issue is raised for the first time on this motion for reconsideration."

By written objections and exceptions in the trial court between the decision and the judgments, and after the judgments, and in the appeal to the Supreme Court Petitioners repeatedly complained about no pleading, and that no possession was possible in this case.

REASONS FOR GRANTING THE WRIT

I.

A STATE COURT HAS NO JURISDICTION, OR POWER, TO DIVEST THE UNITED STATES OF ITS TITLE TO OIL IN PLACE UNDER FEDERAL OIL AND GAS LEASES AND VEST TITLE IN A PRIVATE PARTY. A JUDGMENT THAT DOES SO IS VOID BECAUSE IT VIOLATES THE PROPERTY AND SUPREMACY CLAUSES OF THE CONSTITUTION OF THE UNITED STATES.

The judgment in this case divests the United States of its ownership of the oil underlying federal leases SF079380, SF079381, SF079382, SF079383; and is void.

The Supreme Court of New Mexico affirmed the following judgment of the trial court:

> "1. Defendants PWG Partnership . . . have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title . . . to the oil . . . in and that may be extracted from such leases: SF079380, SF079381, SF079382, SF079383, SF080713B, SF080714-A, NM012292, SF079002, NM012735, and SF079012 . . ." (emphasis supplied) (App. D2-5).

The foregoing adjudication that PWG, et al own full legal title in and to the oil under said lands divests the title of the United States to the underlying deposits of oil in federal lands. In the Mineral Leasing Act of 1920, as amended (30 U.S.C. §§181 et seq.), the United States reserves and retains the ownership of oil and gas

underlying public lands when it issues oil and gas leases. A federal oil and gas lease grants possessory rights only. Boesche v. Udall, 373 U.S. 472, 477 (1963).

The Property Clause of the Constitution of the United States (Art. IV, § 3, cl. 2) provides that Congress has the exclusive power to dispose of public lands:

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

That power is without limitation. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Gibson v. Chouteau, 80 U.S. 92 (1872).

No court, federal or state, has the power to vest legal title to oil in place under federal leases in anyone. Bockfinger v. Foster, 190 U.S. 116, 126 (1903).

The judgment must be reversed because it violates the Constitution of the United States by usurping the exclusive power of Congress over property owned by the United States. If not reversed, the decision of the Supreme Court of New Mexico severely threatens (1) property belonging to the United States, (2) the exclusive power of the Congress to control the disposition of the property of the United States, and (3) the Rules and Regulations prescribed by Congress and the Secretary of the Interior.

The findings, holdings, and final judgments of the New Mexico State Courts below which divest the ownership of the United States of oil underlying lands belonging to the United States of America and place it in private hands and ownership violate the Constitution of the United States. The impact and significance of such

unconstitutional judgments extend far beyond the serious actual breaches of the Constitution and their resultant deprivation of federal ownership into the private domain, as is demonstrated in this case. Here, the extension of the unconstitutional concepts and judgments not only divested the United States of the ownership of oil underlying federal lands and federal leases, but also divest Petitioners and El Paso, the record owner, by recognizing ownership of oil in federal leases by a private individual trespasser and permitting adverse possession by such individual of a non-physical conditional option to purchase related to federal leases.

II.

THE JUDGMENTS OF THE NEW MEXICO COURTS BELOW ARE VOID BECAUSE THEIR ERRONEOUS RECOGNITION OF THE RIGHTS OF UNLAWFUL

POSSESSION OF FEDERAL LEASES THREATENS THE POWER OF CONGRESS AND THE SECRETARY OF THE INTERIOR TO CONTROL THE OCCUPANCY AND USE OF FEDERAL LANDS:

The Supreme Court of New Mexico held that a presumed grant "may be found from evidence supporting the inference (a logical presumption) of a lost or neglected grant followed by long-term, open, active, exclusive possession of property under claim of right and acquiescence or no resistance by interested parties to that possession or claim of right" (emphasis added) (App. A34).

In this case the New Mexico courts ruled that exclusive "possession" by PWG of real property interests of Roseline Abraham (her retained oil rights in federal leases SF079380 and SF079381 in the 32-8 Unit, and in federal leases SF079382 and SF079383 in

the 30-6 Unit) justifies the finding of a presumed grant by her to PWG and further justifies the presumption of a grant by her of the option to repurchase the entire gas rights sold by Mike and Roseline Abraham to El Paso in 1952 (and a grant of rights to liquid hydrocarbons) (App. A34-35).

The Supreme Court of New Mexico bases its presumption of the grant of Roseline Abraham's interests in federal leases on adverse, exclusive possession of the property by PWG, a private party. (App. A34) The "property" in this case is "the oil and liquid hydrocarbons in and that may be extracted from" specified federal leases, and the option to repurchase. (App. E5-6) The decision in this case by a state court interferes with federal law and significantly threatens the exclusive power of Congress and the Secretary of the

Interior to control the possessory rights granted by Congress and the Secretary to Unit Operators and to lessees. Under the Mineral Leasing Act of 1920, as amended (30 U.S.C. §§181, et seq), the United States reserves and retains the ownership and control of the oil and gas underlying public lands. The United States grants only regulated possessory rights to lessees.

". . . Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary . . . He may . . . require the lessee to operate under . . . a unit plan . . . and he may prescribe rules and regulations in minute detail as to all facets of the workings of the land, 30 U.S.C. § 189; 30 C.F.R. pt. 221." Boesche v. Udall, 373 U.S. 472, 477-78, 83 S. Ct. 1373, 1376, 10 L. Ed. 2d 491 (1963).

In order to conserve resources, and to provide economic benefits and facility of regulation, Sec. 17(b) of the Mineral Leasing Act of February 25, 1920, as amended

(30 U.S. C. § 226, [j] authorizes lessees to unite and, under the supervision of U.S. Government personnel, to collectively devise a plan of development and operation. 43 C.F.R. 3186 (formerly 30 C.F.R. 226.1) (App. F8-12).

The Unit Operator of each unit is empowered, and charged, with <u>exclusive possession</u>. ". . . the exclusive right, privilege, and duty of exercising any and all rights . . . necessary . . . for producing, . . . allocating and distributing the unitized substances are hereby delegated to and shall be exercised by the Unit Operator . . ." 43 C.F.R. § 3186(8) (App. F8-12) (formerly 30 C.F.R. § 226) Undocumented intruders are excluded by the United States from any possession. The government maintains its paramount control of the use of its property. The government

protects the exclusive possession of the unit operator whom it has charged with the development, operation and use (under its supervision) of oil and gas leases covering thousands of acres of land.

The agencies of the federal government are charged with protecting the surface owner and the reservoir from damage, accounting for payments of rentals and royalties to the United States, inspection of records, operations, production, and prices, protecting the environment, conservation of resources and prevention of waste, enforcing the government policies of no discrimination, no monopolies, and no aliens, issuing leases, regulating transfers of interests, and protecting its properties from trespass or injury.

In short, to assert a possessory right in a federal lease requires assent of the

officials of the United States entrusted with the control of oil and gas owned by the United States. The decision by the New Mexico Court interferes with the power of the Bureau of Land Management ("BLM") to entrust exclusive possession in a designated, approved Unit Operator, Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966). Recognizing exclusive possession in someone other than the Unit Operator usurps the exclusive power of the federal government to control the occupancy and use of its public lands, and the power to protect federal land from trespass or injury. Const. Art. IV, § 3, Cl. 2 (the property clause); and Art. VI, §2 (the supremacy clause); Gibson v. Chouteau, 80 U.S. 92 (1872); Light v. United States, 220 U.S. 523, 536 (1911); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917);

Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

The Property Clause provides,

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States . . ."

That power of Congress is without limitations. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); Kleppe, supra.

Congress has exclusive power to control the occupancy and use of public lands, and has the power to protect them from trespass. Utah Power & Light Co., supra (a trespass case); Kleppe, supra.

Parenthetically, no title to or interest in U.S. public lands can be acquired by adverse possession, or by prescription. Jourdan v. Barrett, 45 U.S. 169 (1846).

The decision of the Supreme Court of New Mexico should be reversed because its doctrine of presumed grant is predicated on exclusive adverse possession of federal leases. The decision violates, and interferes with, exclusive federal power and control, and should be reversed.

III.

The New Mexico Courts violated the due process requirement of the Fourteenth Amendment to the Constitution of the United States in depriving Roseline Abraham of her property.

Failure to plead issue of presumed grant.

1. After mammoth and expensive discovery, amendments of pleadings, and a copious, rambling pre-trial order setting forth the positions of the parties, the trial court started a bifurcated trial on the issue of "ownership." The doctrine of

presumed grant was never plead or even mentioned directly until after the end of the trial. (App. A31).

2. In its ruling at the end of the trial, the trial court issued a decision against Roseline Abraham, finding a presumed grant by Roseline Abraham of her rights. A majority of a panel of the Supreme Court of New Mexico, over a dissent, affirmed and approved that ruling, which violates Roseline Abraham's 14th Amendment right to not be deprived of her property without due process of law.

3. Petitioners had no notice through the pleadings of their opponents or through the pre-trial orders of the trial court that the issue of "presumed grant" would be litigated. Had Petitioners been advised that such issue was in the case, Petitioners

would have promptly removed the case to federal court.

4. All elements of a presumed lost deed must be pleaded and proved. Clark v. Amoco Prod. Co., 794 F2d 967, 971 (5th Cir. 1986). Also see Hunt v. McCain, 73 S.W.2d 564, 566 (Tex. Civ. App. - Waco 1934, writ dism'd).

Lack of notice of adverse possession.

5. A grant of property may be presumed only if there is notice of adverse possession to, and acquiescence by, the owner. Love v. Eastham, 154 S.W.2d 623, 625 (Tex. 1941). As Justice Franchini concluded in his dissent:

> Roseline had no notice that PWG believed themselves to be the owner of the option. Upon notice that the conditions of the option had been met, Roseline immediately exercised her option. What action could she have been expected to take before that time? And since the option has not been bargained for or expressly documented in any of the agreements,

she could not have been expected to contest its ownership . . . (App. A54-55)

I see no reason to apply the doctrine of presumed grant. Without it, there is no assignment, conveyance or any divesting action by Roseline . . . I would reverse . . . because to do otherwise gives PWG a valuable interest that they never contracted or bargained for . . . (App. A56-57)

Doctrine of presumed grant does not apply to intangible personal property. (An issue of first impression.)

6. Because of the reservation in the United States of all legal title to oil and gas in place under public lands, the leasehold interests at issue in this case are not real property, Boesche, at 373 U.S. 478, and, not being physical, constitute intangible personal property. Given the requirement of proof of the trespasser's "open and notorious dominion and control" of the property to establish a presumption of grant, Love, at 625, in cases where the property in question is intangible personal

property it is impossible to prove sufficient possession.

As Justice Franchini astutely pointed out in his dissent:

> The majority refers in two instances to the "possession" of the option by PWG. That is an interesting concept... An even more interesting question is how do you occupy an option. (App. A53-54)

In fact, the concept of adverse possession or presumed grant of intangible personal property is so peculiar that, before this case, there is no published opinion known to Petitioners upholding it.

Violations of New Mexico statutes.

7. In presuming a grant of community real property by Roseline Abraham, a married woman, the state courts arbitrarily denied to her the statutory protection that a spouse can only be divested of her interest in community real property through a written conveyance signed by her. NMSA 1978 § 40 -

3 - 13 (formerly NMSA 1953 § 57 - 4A - 7) (App. I-1-4)

8. The Supreme Court of New Mexico disregarded New Mexico statutory and case law that any purported conveyance of her property is void without her signature, even though her spouse signed, Arch, Ltd. v. Yu, 766 P2d 911 (1988) (opinion written by same person who wrote the opinion in this case), based on the arbitrary finding that "she agreed to sell".

9. The trial court arbitrarily found that Mike Abraham had "general authority" from her ("whatever he wanted her to sign, she signed") and disregarded another salutary statute in New Mexico that any authority of an agent to bind a spouse as to community real property requires a written power of attorney, filed for record. NMSA 1953, § 70 - 1 - 6 (App. I-3-4-5).

10. A federal court would have recognized and ruled that PWG's assignor, Rincon, ("the grantee"), was satisfied with the performance of the agreement to convey by the Abrahams.

a. The New Mexico Courts ignored the uncontradicted testimony of W.H. Hudson, exclusive manager of Rincon before and after June 1, 1963, (App. H1-3) that he, and Rincon, were satisfied with the performance of the Agreement to Convey by the Abrahams. (App. H1-3) The uncontradicted testimony of Billie Fuller corroborated Hudson - Rincon was satisfied. (App. H3-8)

b. A federal judge would follow the rule laid down in Williams v. Eggleston, 170 U.S. 304 (1898):

> . . . the parties to a contract are the ones to

> complain of a breach, and if they are satisfied with the disposition which has been made of it, and all claims under it, a third party has no right to insist that it has been broken . . ."

c. In following that rule, a federal judge would rule that PWG et al have no standing.

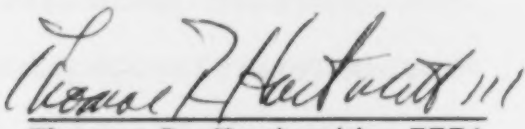
11. A federal court would not write a new contract and divide the indivisible option (one $25,000 purchase price) into ten leases, each of which differs in size and value, by rewriting the agreement of the parties. The unambiguous, certain language of the option, ". . . shall have the option to repurchase . . . for . . . $25,000.00 the entire interest of Seller in the said leases being sold herein . . ." (App. A4) Both parties to the contract, El Paso and Roseline Abraham, repeatedly maintained that the option could not be divided by leases.

The trial court arbitrarily ruled that it was divisible. (App. E2). The New Mexico Supreme Court arbitrarily affirmed and approved the trial court's writing a new contract for the parties.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX - A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

EL PASO PRODUCTION COMPANY, et al.,
Plaintiffs-Appellees, and Cross-Appellants,

v.

PWG PARTNERSHIP, et al.,
Defendants-Appellees,

v.

Steve J. ABRAHAM, Personal Representative of the Estate of Roseline Abraham, and Steve J. Abraham, Michael C. Abraham and Diane Abraham Hinkle, individually and as surviving children of Roseline Abraham, deceased,
Defendants-Counterclaimants-Appellants and Cross-Appellees.

No. 20210.

Supreme Court of New Mexico.

Dec. 1, 1993.

Rehearing Denied Jan. 3, 1994.

OPINION

RANSOM, Chief Justice.

The Abraham family appeals from a declaratory judgment in an action brought by

El Paso Production Company (El Paso) to determine the validity of an option contract and ownership of the right to repurchase gas rights under a federal oil and gas lease. El Paso cross-appeals from an amended judgment wherein the district court reduced a sanction for contempt of court from $24,000 to $300. On the Abrahams' appeal we affirm the decision of the court below, but on the cross-appeal we reverse and remand for entry of judgment that conforms to the findings of fact.

Facts regarding ownership. In the late 1940s and early 1950s, Mike and Roseline Abraham, along with Mike Abraham's brother and sister-in-law, J.R. and Dorothy Abraham, acquired several federal oil and gas leases in the San Juan Basin of northwestern New Mexico. Mike and Roseline held record title to eight of the ten leases involved in this

litigation, and J.R. and Dorothy held record title to the other two. In 1951, the Abrahams agreed to sell to General American Oil Company of Texas one-half of their interest in the leases. Under this agreement, General American was to provide for the development of the oil and gas and to advance or "carry" the Abrahams' expenses associated with this development. These "carried working interest" expenses would then be paid from the profits attributable to the Abrahams' retained interest.

In 1952, General American assigned its interest to El Paso Natural Gas Company (the parent company of El Paso Production Company). On September 25 and 26, 1952, Mike and Roseline, as sellers, and El Paso Natural Gas, as buyer, executed an oil and gas lease sale agreement known as GLA-59. Mike and Roseline agreed to sell to El Paso

Natural Gas their remaining carried working interests in the leases described above for $925,000. In the agreement, the Abrahams reserved from the sale all existing royalties and overriding royalties, all oil under the leased lands, and all liquid hydrocarbons extracted from the gas by field separators. The Abrahams also reserved the right to repurchase the leases for a cash payment of $25,000 after El Paso Natural Gas had produced 30,000,000 mcf of gas from their interest plus enough gas to cover the costs of development and production under the original General American contracts. This repurchase option agreement is the subject of the current litigation. GLA-59 was recorded in the land title records of San Juan and Rio Arriba Counties and the assignments of the individual leases were executed in 1953. In May 1963, the Abrahams

sought to pay off debt and to consolidate their San Juan Basin oil and gas interests, including the GLA-59 reserved interests. To secure financing of $1.5 million dollars from Chemical Bank Trust Company of New York, Mike and Roseline reorganized one of their corporations, Universal Minerals, to which were transferred their reserved oil and gas interests and those of J.R. and Dorothy. Chemical Bank paid most of the proceeds from the financing to named creditors of Mike and Roseline, Universal Minerals, and J.R.

Mike and Roseline signed a transfer agreement of May 29, 1963 that included a description of the following GLA-59 oil and gas assets transferred to Universal Minerals:

> 7. Carried working interests in the 30-6 Unit, Rio Arriba County, New Mexico (reference is made to Exhibit "B" of the 30-6 Unit Agreement for a

complete description of said interests.)

8. Carried working interests in the 31-6 Unit, Rio Arriba County, New Mexico (reference is made to Exhibit "B" to the 31-6 Unit Agreement for a complete description of said interests.)

J.R. and Dorothy ratified the agreement in order to merge any retained interests into that transaction. Universal Minerals simultaneously became Rincon Oil & Gas Corporation, with Mike Abraham owning 80% of the stock and an option to purchase the remaining 20% from W.H. Hudson, a corporate manager who had been hired to manage Rincon until Chemical Bank was repaid the outstanding loan amount. On June 3, 1963, Mike and Roseline executed a conveyance to Rincon describing six leases in GLA-59. Apparently, Mike and Roseline may have failed to execute conveyances for the two leases

remaining in their names, and J.R. and Dorothy may have executed no conveyances.

In 1964, Mike Abraham was forced into bankruptcy. He signed under oath the schedule requiring the identification of all assets he owned. The schedule did not include any assets in the GLA-59 leases, but did include Abraham's 80% ownership in Rincon's stock and his option to purchase the outstanding stock. Abraham sought confirmation of a reorganization plan to sell Rincon to another corporation, stating that

> Rincon also owns an undivided working interest in oil production and liquid hydrocarbon production covering several thousand acres of lands in T30N R7W, T30N R6W, and T32N R8W. In addition to owning the oil rights in said acreage, Rincon owns an option (at such time as El Paso Natural Gas Company has produced and saved from the lands subject to the agreement gas attributable to the interest of Rincon in a total amount of 30,000,000 mcf,

> together with an amount of gas sufficient to reimburse El Paso for all production, development, and operating costs) to repurchase all of the interests sold to El Paso Natural Gas Company for the sum of $25,000 in cash.

The bankruptcy court did not approve this plan, but it did approve the sale in 1966 of all of the bankruptcy estate's interest in the Rincon stock to Chemical Bank in discharge of $2 million of debt. No one raised objections to the sale.

At trial, the district court received evidence that Mike Abraham had knowledge during the bankruptcy proceedings that the option to repurchase the gas leases could ripen as early as 1972. In July 1973, PWG Partnership contracted with Rincon (now owned by Chemical Bank) to purchase all of Rincon's interests in all oil and gas properties and estates. Rincon made both a

specific and a general conveyance to PWG, with the general conveyance transferring:

> All leasehold ... interests ... and other interests in oil, gas and other liquid hydrocarbons owned and held by Grantor in any lands located within the Continental limits of the United States of America, and any contracts ... and other instruments which relate thereto....

The district court heard testimony that, while Mike Abraham was a brilliant and astute oil and gas investor, he had terrible record-keeping skills, and the general conveyance was intended to pick up all interests not covered by specific conveyances. Beginning in June 1976, El Paso Natural Gas began paying PWG for liquid hydrocarbons extracted from gas under the GLA-59 leases. Mike Abraham died in 1985. El Paso Natural Gas assigned its interests in the leases to El Paso in 1986. In the summer of 1989, PWG attempted to exercise

its option to repurchase the gas leases, believing that the conditions precedent had been met. When Abrahams' attorney Thomas Hartnett III (who had represented Mike in the bankruptcy and both Mike and Roseline in the reorganization of Universal Minerals) heard of PWG's claim, he informed Roseline and her children, who then also laid claim to the option. This suit ensued.

Findings and conclusions of the trial court.--The option to repurchase. After many motions for summary judgment and a full trial on the merits to determine the ownership of the option, the trial court first concluded that the option to repurchase was valid and enforceable against El Paso. This law of the case has not been challenged on appeal unless this Court reverses the decision on ownership and finds that the Abrahams own the option, in

which case El Paso has raised several arguments challenging the trial court's conclusion on validity.

The trial court found that the agreement of May 29, 1963, in which both Abraham brothers and their wives agreed to transfer to Rincon their carried working interests in the GLA-59 leases, was ambiguous because all "carried working interests" had already been assigned to El Paso Natural Gas. The court then looked to the referenced Exhibit "B" for a description of the interests in order to ascertain what the Abrahams were agreeing to convey. That exhibit listed only the leases and a variety of oil and gas rights. There was no language in the agreement or in the exhibit limiting the scope or rights to be conveyed to Rincon. The court determined from the four corners of the agreement that the

phrase "carried working interests" clearly referred and must have been intended to refer to "rights in or to the oil and gas" in a given lease. The court decided that the agreement of May 29, 1963 intended to transfer all rights that remained in the leases, which consisted of the reserved oil and liquid hydrocarbon rights and the option to repurchase the gas leases. The court buttressed its interpretation by noting that the conduct of the parties after the transfer was consistent with that interpretation. Specifically, Mike Abraham, J.R. Abraham, Hartnett, Hudson, Chemical Bank, El Paso Natural Gas, and the bankruptcy trustee all accepted and acted for some twenty-six years upon the notion that those rights had been transferred to Rincon. Finally, the court concluded that the conveyance of June 3, 1963 spoke in

terms of conveying all of Mike and Roseline Abraham's "right, title, interest, claim and demand in and to the oil and gas properties," and determined that the conveyance, from its explicit language, was intended to pass, in the way of oil and gas rights, everything that was able to be transferred as to a mentioned lease, and that "gas rights" included the right to buy back the gas production in a given lease on the happening of a certain event. (In the alternative, the court found that since the option to repurchase benefitted only the holder of the reserved oil rights, that option was a covenant running with the oil and liquid hydrocarbons and passed with the conveyance of the oil and liquid hydrocarbons in that lease.)

The leases for which there was no conveyance documentation. The trial court

found that the Abrahams agreed to convey to Universal Minerals (Rincon), and that Chemical Bank (and, later, PWG) paid for the conveyance of the Abrahams' interests in all ten of the leases described in the GLA-59 agreement, even though PWG only could produce conveyances for six leases. The court found that because of the scant documentation provided by Mike Abraham and because at the time of the agreement Rincon had no separate counsel who could check to be sure that all conveyances had been made, the general conveyance from Rincon to PWG purported to convey all assets of every kind, both documented and undocumented. Further, the court found that because oil and gas resources are subject to permanent depletion, an owner must diligently act upon his rights in order to avoid loss of the resource. These facts, together with PWG's

long-continued possession of the rights with no objection or challenge from the Abrahams, led the court to believe that Mike Abraham was telling the truth in his bankruptcy--that all necessary conveyances had been made such that he and his wife held no legal or equitable title in the leases. The court then invoked a property rule that presumed a grant from Mike and Roseline Abraham and J.R. and Dorothy Abraham for the four leases that had been included in the transfer agreement but for which there was no conveyance documentation. Under that presumption, the court assumed that "all that might lawfully have been done to perfect legal title was in fact done, and in the form prescribed by law."

Alternative findings and conclusions. In the event of reversal by this Court, the district court made alternative findings and

conclusions. The court found that PWG should be granted legal title to the leases under the doctrine of equitable conversion. The court also found that the Abrahams and their heirs were judicially estopped from laying claim to the interests because of the sworn testimony to the bankruptcy court that the Abrahams did not own the interests because they had been sold to Rincon. Finally, the trial court found that judicial estoppel also should apply because the Abrahams had received $1.5 million for those interests plus forgiveness of debt in the bankruptcy action in exchange for the sale of the assets to Rincon. The court stated that to recognize the Abrahams' claim to the interests now "would be playing fast and loose with, and subverting, the system of justice."

Issues in the Abrahams' appeal. Finding them dispositive, we address only two of the Abrahams' claims of error: that the district court erred in ignoring the intent of the parties to GLA-59 that the 1952 option to repurchase was personal to Mike and Roseline Abraham, and that the district court erred as a matter of law in applying the doctrine of presumed grant to divest Roseline Abraham of her right to the unconveyed leases.

Because we believe that the court correctly interpreted the contract and correctly applied the doctrine of presumed grant, the alternative findings and conclusions are not relied on, and error claimed in that regard will not be addressed. Likewise, because the court found that the option to repurchase passed to Rincon in the conveyances and agreement

of May 29, 1963, all of which were signed by Roseline Abraham, questions as to due process and equal protection (by taint from the acts of her husband) are not applicable--Roseline Abraham clearly conveyed her rights in the option to Rincon. Finally, determining that Roseline Abraham did not have a right to a jury trial because all relief requested was equitable, we find no merit in the argument that the trial court erred in refusing to grant a jury trial. See Evans Fin. Corp. v. Strasser, 99 N.M. 788, 789, 664 P.2d 986, 987 (1983) ("If the remedy sought is legal, parties are entitled to a jury trial; if the remedy sought is equitable, there is no jury trial as of right.").

The option to repurchase was an assignable right. The Abrahams urge this Court to find that the 1952 option to repurchase was

personal to Mike and Roseline and not assignable. They argue that Texas law must be used to interpret the contract because the parties agreed that Texas law would control. Citing Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189 (Tex.Civ.App.1977), writ ref'd n.r.e., the Abrahams claim that in Texas, options to repurchase are personal covenants that cannot be transferred. Prochemco, however, does not support that proposition and is not applicable to the facts of this case. In Prochemco, the agreement provided that the terms of a contract were covenants running with the land, and the agreement had no provision granting successors or assigns the right to exercise the option to extend the contract. Id. at 190. The Prochemco court noted that parties may determine that an option will be personal and nonassignable, see id. at 191,

but by no stretch of interpretation did the court hold that all option contracts are personal and nonassignable. In contrast, the Texas courts, see e.g., Hott v. Pearcy/Christon, Inc., 663 S.W.2d 851, 853-54 (Tex.App.1983), writ ref'd n.r.e., cite favorably to the Contracts Hornbook written by Calamari and Perillo, which suggests that once an offer to purchase has ripened into an option contract by the payment of money to secure the option, the rights created usually are assignable, unless the option calls for some sort of personal performance. John D. Calamari & Joseph M. Perillo, Contracts § 18-32 (3d ed. 1987). Professor Ronald Benton Brown, in his Note on real estate purchase options states that

> [t]he rights of the optionee may be transferred and the obligations of the optionor may bind those to whom the optioned

> land has been transferred. The question of whether that has happened is primarily a question of the intent of the parties to the option.... Ordinarily, an optionee would be unlikely to bargain for a right which could be defeated by the sale to another and so the option should be presumed binding on the optionor's successors unless otherwise agreed.

Ronald B. Brown, An Examination of Real Estate Purchase Options, 12 Nova L.Rev. 147, 187-88 (1987). In the case at bar, the parties expressly provided that the GLA-59 agreement would "inure to the benefit of and be binding upon the said parties and their respective heirs, successors and assigns."

The Abrahams argue that if this Court finds that the option was assignable, it would violate the rule against perpetuities, and the Court should construe the contract

so that a violation would not occur[1]. At common law, the rule was designed to prevent the vesting of a future interest in property at an indefinite date that could exceed a length of time established as a life in being at the time of the creation of the interest plus twenty-one years. See Producers Oil Co. v. Gore, 610 P.2d 772, 774 (Okla.1980); Gartley v. Ricketts, 107 N.M. 451, 453, 760 P.2d 143, 145). The rule was judicially designed to prevent remote vesting of contingent interests in real property. Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 540 (Colo.1985) (en

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[1] We note that the rule against perpetuities is no longer part of our New Mexico statutes. See NMSA 1978, § 47-1-17.1 (Supp. 1992) "perpetuities" from section); NMSA 1978, § 47-1-17.1 (Supp. 1992) (repealed). Under the old statue, New Mexico took a "wait and see" and "cy pres" approach to determining if future interests were void. See NMSA 1978 § 47-1-17.1 (Repl. Pamp. 1991); Gartley v. Ricketts, 107 N.M. 451, 453, 760 P2d 143, 145 (1988).

banc). Options to purchase leased premises within the term of the lease are exempt from the rule. See id.; Gore, 610 P.2d at 774 (holding that rule does not apply to conditional preemptive options in operating agreements under oil and gas leases because oil and gas production cannot last indefinitely and rights are always terminable); cf. III Lounge, Inc. v. Gaines, 217 Neb. 466, 348 N.W.2d 903, 907 (1984) (lease provision allowing exercise of option "at any time" would be construed to allow exercise at any time within the term of the lease).

The option to repurchase in the case at bar was conditioned upon an event that was likely to occur or fail to occur within a reasonable amount of time because of the nature and use of the reservoir. Under the operating agreement that formed the basis of

GLA-59, El Paso was required to drill at least eighteen wells within five years and agreed to produce and market the gas under the terms of the agreement.

As the Abrahams stated in their brief, the Texas case of Mattern v. Herzog, 367 S.W.2d 312 (Tex.1963), gives us guidance on the Texas application of the rule against perpetuities: "When the wording of the option does not compel a construction that the parties intended that the time element should be unlimited, the court will not construe an option contract ... to run for an indefinite time and thus destroy the validity of the option provision." Id. at 319. Because we can infer a reasonable time limitation in the agreement, and because the condition precedent from which the option arose did occur within twenty-one years of the death of a life in being at the creation

of the option, no violation of the rule occurred under Texas or New Mexico law. We affirm the district court's conclusion and hold that the option to repurchase in the GLA-59 agreement was an assignable right, not personal to Mike and Roseline Abraham.

The doctrine of presumed grant. The Abrahams claim that New Mexico does not recognize the doctrine of presumed grant, and that even if we do recognize it, the theory should not be applied in this case because it was never pled, tried, nor reasonably contemplated by the Abrahams during the trial. The doctrine of presumed grant is a rule of property law that crystallizes from a rebuttable presumption. See 3 Am.Jur.2d Adverse Possession § 5 (1986). For many years it has received recognition in the United States as an appropriate means to quiet long possession

and it is based upon concepts of both logic and policy. It is logical because the inference of a lost or neglected grant is a natural one to be drawn from the facts; it serves the policy of protecting those who have maintained long possession of property with acquiescence from the record owner. Fletcher v. Fuller, 120 U.S. 534, 7 S.Ct. 667, 30 L.Ed. 759 (1887), appears to be the seminal case applying the doctrine. There, the Fletchers, whose family had been in possession of land for almost 100 years, could not produce a deed conveying title to the Fletchers' vendor, who was the grandson of the original owner. The devisees of the original owner claimed title under the owner's will, which had been probated some twelve years before the transfer to the Fletchers' predecessor. In the trial on the merits, the Fletchers asked for a jury

instruction as to the presumption the jury might make of a lost grant to their ancestor in title. The instruction the court refused to give stated, in part,

> "if you find that you can presume a grant, if you find from the testimony that there was a lost deed ... so that Jeremiah had a good title to convey to Stephen Jencks, that makes the title of the defendants here complete.... [T]he presumption ... was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor."

Id. at 544-45, 7 S.Ct. at 673.

In finding that the trial court erred in refusing to give the charge, the Supreme Court stated:

> It may be, in point of fact, that permission to occupy and use was given ... upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain....
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> * * * * * *

> The law ... by reasonable presumptions ... affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title....
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> * * * * * *
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> It is not necessary, therefore, ... for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution.

Id, at 545-47, 7 S.Ct. at 674.

The Fletcher court added that

> presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be instructed that it is their duty to presume such a conveyance, and thus quiet the possession.

Id. at 550, 7 S.Ct. at 676. As in Fletcher, there is proof in this case that the former owner actually agreed to sell and did sell the property in question and then acquiesced in the buyer's rights and interests in the property. Under New Mexico Rule of Evidence 301 the resulting logical presumption of a lost or neglected grant is not mandatory, see Mortgage Inv. Co. v. Griego, 108 N.M. 240, 243-44, 771 P.2d 173, 176-77 (1989), but as in Fletcher, under a rule of property law the presumption of a grant arguably is mandatory as a matter of public policy if unrebutted. Cf. Hester v. Sawyers, 41 N.M. 497, 504, 71 P.2d 646, 650 (1937) (holding that once party has proven statutory time period of adverse possession, presumption of grant is conclusive); Baker v. Certain Lands, 19 Ark.App. 253, 720 S.W.2d 318, 320-21 (1986) (holding that when one in

possession has paid taxes on lands previously forfeited to the state, redemption by grant is presumed as a matter of law).

Texas courts require evidence of three elements in order for the presumption of grant to arise: "long-asserted and open claim, adverse to the apparent owner, ... non-claim by the apparent owner, ... [and] acquiescence by the apparent owner in the adverse claim." Magee v. Paul, 110 Tex. 470, 221 S.W. 254, 256 (1920); see also Bodin v. Gulf Oil Corp., 707 F.Supp. 875, 884 (E.D.Tex.1988) (holding that the doctrine of presumed grant "is designed to quiet title where there is (1) a long period of occupancy and dominion of the land by one party, that is (2) inconsistent with the record ownership vested in another party during which time (3) the legal owner did

not attempt to exercise any rights"); cf. United States v. Fullard-Leo, 331 U.S. 256, 273, 67 S.Ct. 1287, 1295, 91 L.Ed. 1474 (1947) (requiring, for the doctrine of lost grant to be applicable, possession under a claim of right, actual, open and exclusive, and stating that chain of conveyances and payment of taxes is important). It is the acquiescence in the possession and assertion of ownership that affords the basis for finding that the title passed to the possessor by deed or otherwise. M.T. Humphries v. Texas Gulf Sulphur Co., 393 F.2d 69, 72 (5th Cir.1968) (applying Texas law). Although there is dicta in Clark v. Amoco Prod. Co., 794 F.2d 967 (5th Cir.1986), that in Texas a presumed lost deed must be pled and proved by the party asserting it, see id. at 971, a reading of the case on which that dicta was based

(Harvey v. Humphreys, 178 S.W.2d 733 (Tex.Civ.App.1944), writ ref'd n.r.e.) does not lead this Court to that same conclusion. It is not necessary to plead specifically the existence of logical inferences in order to apply the resulting rule of law that determines a property interest. The trial court raised the possibility of applying the presumption during the trial, and we hold that the trial court had discretion to do so.

Relying on Fiest v. Steere, 175 Kan. 1, 259 P.2d 140 (1953), the Abrahams urge that the doctrines of adverse possession and prescriptive right have replaced the need for presumed grant, but we are not convinced of that proposition.

> The doctrine ... that the long[-]continued possession of land by one claiming as owner gives rise to the presumption of a valid conveyance to him or to the person under whom he claims,

> though ordinarily similar in its practical results to the statutes of limitation [for adverse possession], is entirely independent thereof. It involves a presumption of the rightfulness of one's possession, while the statutes of limitation are by their terms applicable only when the possession is, apart from such statutes, wrongful.

4 Herbert T. Tiffany, The Law of Real Property § 1136, at 700 (3d ed. 1975) (footnotes omitted). In New Mexico, adverse possession requires color of title supported by a writing or conveyance of some kind and payment of taxes during the period of possession, see NMSA 1978, § 37-1-22 (Repl.Pamp.1990); Currier v. Gonzales, 78 N.M. 541, 434 P.2d 66 (1967); Platt v. Martinez, 90 N.M. 323, 324, 563 P.2d 586, 587 (1977), neither of which are required to find presumption of a grant. "Where adverse possession can be shown, the doctrine of presumption of grant has no application."

Board of Trustees v. Rye, 521 So.2d 900, 906 (Miss.1988).

Therefore, a presumption of grant may be found from evidence supporting the inference (a logical presumption) of a lost or neglected grant followed by long-term, open, active, exclusive possession of property under claim of right and acquiescence or no resistance by interested parties to that possession or claim of right. Here, based on the written and signed agreements to transfer the leases, the complete performance of one of the parties[2], and the statement by Mike Abraham that the interests had been conveyed, the trial court found that the grant should have been made if it in fact had not been made. We affirm the trial court's decision on ownership.

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[2] Chemical Bank refinanced and took a mortgage on Rincon based on the agreement and alleged performance of the agreement.

El Paso's appeal of the trial court's reduction of the civil contempt award.-- Summary of proceedings below. El Paso filed its complaint for declaratory judgment in New Mexico on November 22, 1989. On June 1, 1990, Steve Abraham as personal representative of the Abraham estate (represented by Hartnett) filed suit against El Paso in the Probate Court of Harris County, Texas over the same subject matter. El Paso then filed in New Mexico a motion to enjoin prosecution in Texas, and on November 27, 1990 an injunction was entered enjoining further prosecution of the Texas action. Hartnett advised Steve Abraham to remove himself as personal representative and to procure the appointment of another personal representative. Hartnett then prepared a first amended complaint in the Texas action and applied to the Texas probate court for

permission to file it. El Paso filed a motion in New Mexico for an order to show cause, seeking to hold Hartnett in contempt for violation of the injunction. The district court, in its findings and conclusions, established that Hartnett's actions violated the injunction; that, as a direct result of Hartnett's violation of the injunction, El Paso was required to hire counsel to appear in the Texas probate court; and that El Paso had incurred $24,000 in legal fees and expenses that would not have been incurred but for Hartnett's conduct in violating the injunction. The court then ruled that a judgment would be entered in due course, concluding that Hartnett was in civil contempt of court and that El Paso should recover from Hartnett the sum of $24,000. Three months later, the court entered an

amended judgment of civil contempt (even though a judgment containing his original ruling was never entered) reducing the award to $300. The court decided that the reduced award was justified because Hartnett had done nothing directly or indirectly to advance prosecution of the Texas action after the court had originally announced its decision.

--Claims of error. El Paso contends that once it established its entitlement to compensation, the district court's discretion to fashion an appropriate award to address Hartnett's contempt was limited to awarding El Paso full compensation for expenses incurred as a result of the contempt. El Paso cites numerous cases for its position. Hartnett's answer to the claim of error is that El Paso's appeal is frivolous because a trial court always has

the power to change its interim findings until it loses jurisdiction of the case.

--Purpose of civil contempt penalties. Courts have both statutory and inherent authority to punish for contempt. NMSA 1978, § 34-1-2 (Repl.Pamp.1990); State v. Clark, 56 N.M. 123, 125, 241 P.2d 328, 329 (1952) (stating that the contempt statute is "only declaratory of the common law"). This Court discussed at length the difference between civil and criminal contempt in Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953). We quoted to Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911), for the proposition that "[i]f it is for civil contempt the punishment is remedial, and for the benefit of the complainant." Jencks, 57 N.M. at 633, 261 P.2d at 659. We expanded the discussion of contempt further in State

ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc., 74 N.M. 201, 392 P.2d 347 (1964). In that case, we stated:

> Judicial sanctions may ... be employed in civil contempt for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses sustained.
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> * * * * * *
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> Where the purpose is to make the defendant comply, the court's discretion is exercised in considering the character and degree of the harm threatened by the continued contumacy and whether or not the contemplated sanctions will bring about a compliance with the court's order.

Id. at 204-05, 392 P.2d at 349-50.

In In re Klecan, 93 N.M. 637, 603 P.2d 1094 (1979), we further distinguished between civil and criminal contempt actions. We stated "[c]ivil contempts are those proceedings instituted to preserve and enforce the rights of private parties to

suits and to compel obedience to the orders, writs, mandates and decrees of the court; whereas criminal contempt proceedings are instituted to preserve the authority and vindicate the dignity of the court." Id. at 638, 603 P.2d at 1095 (emphasis added). Clearly, the case before us now is one of civil contempt.

This Court has never passed on the question of whether a court has discretion not to award damages for actual losses once it has found that a violation of an injunction has occurred which resulted in actual damages in an ascertained amount. Other courts have. In Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir.1979), the Second Circuit held that in an order of civil contempt a district court was not free to withhold damages to the extent they are proven. See also W.E.

Bassett Co. v. Revlon, Inc., 435 F.2d 656, 665 n. 5 (2d Cir.1970) ("The plaintiff in a civil contempt case may recover not less than the expenses, including counsel fees, which it has incurred in enforcing the disobeyed order of the court."). The Seventh Circuit sheds further light on the question of discretion:

The type of proceeding ... determines the degree of discretion which the district court may properly exercise over the course of the proceedings.... Since the rights of the complainant, not the authority of the court, are at stake in a civil contempt proceeding, the discretion of the court over the proceeding is more limited.... If Ms. Thompson was able to establish that the defendant violated the court's order, the court would have broad discretion in fashioning an equitable remedy to ensure

future compliance, but the award of compensatory damages for past violations would not be subject to the discretion of the court.

Thompson v. Cleland, 782 F.2d 719, 721-22 (7th Cir.1986).

The First Circuit also holds that a court has no discretion in this type of proceeding. In Parker v. United States, 153 F.2d 66, 70 (1st Cir.1946), the court first analogized the imposition of a compensatory fine in civil contempt to a tort judgment for damages caused by wrongful conduct. The sanction in that case was employed to make reparation to the injured party and to restore him to the position he would have held had the injunction been obeyed. The Parker court held that the district court was not free to exercise discretion and withhold an order for damages, once

established. Id.; see also In re Grand Jury Subpoena of June 12, 1986, 690 F.Supp. 1451, 1453 (D.Md.1988) ("Once the complainant demonstrates actual losses stemming from the contumacious behaviour, the Court is not free to exercise its discretion and withhold an order awarding compensatory damages.").

Courts in the Sixth and Eighth Circuits have stated that a complainant is entitled to enforcement of court orders vindicating private rights. See L.E. Waterman Co. v. Standard Drug Co., 202 F. 167, 172 (6th Cir.1913); Enoch Morgan's Sons Co. v. Gibson, 122 F. 420, 423 (8th Cir.1903). These holdings all are in accordance with the principles of tort law--once a duty has been established (to abide by the injunction, in this case) and the defendant violates that duty (by violating the injunction), if the plaintiff proves

proximate cause of the damages (the necessity of hiring counsel to defend the lawsuit brought in violation of the injunction) and proves the amount of the damages (found to be $24,000 in this case), then the plaintiff has the right to recover those damages. We hold that once a plaintiff satisfies his burden of proving violation of a court order, proximate cause, and damages, he or she is entitled to judgment for recovery of those damages. Of course, if the damages were in the form of attorney's fees in defending against the violation, as in this case, the court has discretion in determining the reasonableness of those fees. The court additionally may award attorney's fees incurred in obtaining the order of contempt. We find that the trial court erred in failing to enter a

judgment for the amount of the damages proved.

There is another reason why the judgment of the trial court must be reversed. The court entered a judgment that was not supported by the findings of fact. Defendant Hartnett did not challenge the court's findings on appeal, and those findings shall now remain undisturbed. "[A] judgment cannot be sustained on appeal unless the conclusion upon which it rests finds support in one or more findings of fact." Thompson v. H.B. Zachry Co., 75 N.M. 715, 716, 410 P.2d 740, 742 (1966). The trial court entered judgment for only $300 after it found that El Paso's compensable damages were in the amount of $24,000. In cases tried by the court, the findings of fact by the court have the same force and effect as the verdict of a jury. Grayson v.

Lynch, 163 U.S. 468, 472, 16 S.Ct. 1064, 1066, 41 L.Ed. 230 (1896) (appeal from the Supreme Court of New Mexico). In effect, the court entered judgment notwithstanding its own verdict, and it did that without even a motion or challenge by the defendant.

The rules of civil procedure (SCRA 1986, 1-052 (Repl.Pamp.1992)) require the trial judge to make and file his decision " 'consisting of findings of such ultimate facts and conclusions of law stated separately as are necessary to support his judgment, in a single document; and that he sign and file such decision in the cause as a part of the record proper.' " Lusk v. First Nat'l Bank, 46 N.M. 445, 449, 130 P.2d 1032, 1034 (1942) (emphasis added) (emphasis in original deleted) (quoting McDaniel v. Vaughn, 42 N.M. 422, 423, 80 P.2d 417, 417 (1938)). The court could have filed an

amended decision before entry of judgment, see SCRA 1986, 1-052(B)(1)(g), but it did not do so. Under the rule, "findings or conclusions not embraced in the single document ..., even though appearing elsewhere in the record, will be disregarded...." Id. The court justified the reduction of the award in its judgment by stating that it reduced the award granted in the decision because Hartnett "has done nothing directly or indirectly to advance prosecution of the Harris County Action" since the original violation of the injunction. The court then noted that the primary purpose of its issuance of the order to show cause was to coerce compliance with the injunction. However, nothing in the court's decision states that purpose, and the damages awarded in the decision were compensatory and not punitive damages.

Therefore, we affirm the decision of the trial court in regard to the declaratory judgment, and reverse and remand the judgment for contempt for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BACA and FROST, JJ., concur.

FRANCHINI, J., dissents.

MONTGOMERY, J., not participating.

FRANCHINI, Justice (dissenting).

It is my opinion that Roseline Abraham never assigned, conveyed or divested herself in any manner of the option to repurchase; and that PWG never contracted or bargained for the option.

Assignment

Although it is not affirmatively stated, I conclude that the majority agrees

that Texas law applies to the subject case. I view Prochemco in a different light than either the majority or the appellant. It seems to me that Prochemco, Inc. had a real property interest as the landowner (through its wholly-owned subsidiary) and a personal property interest as the holder of an option to extend the contract. Whether or not Prochemco's option was assignable was the controlling factor in that dichotomy. Subsequently, the wholly-owned subsidiary conveyed a 99% interest in the land to a third party. Prochemco then quitclaimed to the third party all of its right, title, and interest in the land. Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189 (Tex.Civ.App.1971), writ ref'd n.r.e. The third party asserted that since the interests were conveyed, Prochemco no longer had an option that could be exercised under

the theory that the option had run with the land.

The difference between the two cases is that the option in Prochemco was for the benefit of the land and thus was held to run with the land. The option in the instant case was for the direct benefit of the Abrahams and therefore a personal covenant. If, in fact, the Texas Court had considered the option to be conveyed along with any right title and interest that Prochemco had in the real property, then the quitclaim deed would have conveyed any rights under the option as well. The Court, however, found that it did not and that the option had survived that conveyance. The majority bases its opinion upon the assignment of the option to repurchase by the Abrahams in the transfer agreement of May 29, 1963. The general rule in Texas law is that personal

property does not pass in the assignment of an oil and gas lease unless it is expressly passed. OTC Petroleum Corp. v. Brock Exploration Corp., 835 S.W.2d 792 (Tex.Civ.App.1992) (citing Phillips Petroleum Co. v. Adams, 513 F.2d 355, 363 (5th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 281, 46 L.Ed.2d 259 (1975)). In that agreement there is no specific conveyance of personal property or the option. From these facts, I conclude that unless expressly enumerated, a conveyance of real property (fee simple or lease) does not include options that a person may possess that are personal and do not run with the land.

The majority then extensively analyzes the conduct of Mike Abraham as to his interest in the repurchase option. I consider this to be immaterial. The party in interest in this suit is the Estate of

Roseline Abraham. Roseline was not a party to the 1964 bankruptcy plan proposed by Mike Abraham. Whatever representations made by Mike Abraham within that plan are not binding upon Roseline. At no time from 1951 through her death did Roseline expressly convey her interest in the option nor did she represent to any party that she had conveyed such an interest. The reasoning of the majority stretches to impute the conduct and intentions of all the other parties, without express or implied authority, to Roseline. There is no theory of law in Texas or New Mexico that I am aware of that would allow that result.

Intent

Texas law emphasizes, as a threshold analysis, the ambiguity of an assignment or conveyance. OTC Petroleum Corp., 835 S.W.2d at 794. "To ascertain the objective

intention of the parties, the courts examine and consider the entire writing, seeking to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." Id. (citing Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154 (1951)). Nowhere in the transfer is there an express conveyance of the option to PWG or is there any indication that PWG bargained for that conveyance. I, therefore, conclude that there was no objective intention to convey the option.

Presumed Grant

The majority refers in two instances to the "possession" of the option by PWG. That is an interesting concept. Perhaps if the Abraham's had assigned their interests in their original mineral lease agreement then there would have been an argument that

PWG possessed the option. That is not the case. In the benchmark case in New Mexico concerning presumed grant, Justice Brice references a property treatise on presumptive grant which states that "[t]his rule is based upon the assumption that if there had been no grant, the owner would have put an end to the wrongful occupation before the full period of limitation had expired." Hester v. Sawyers, 41 N.M. 497, 502, 71 P.2d 646, 651 (1937). An even more interesting question is how do you occupy an option. Roseline had no notice that PWG believed themselves to be the owner of the option. Upon notice that the conditions of the option had been met, Roseline immediately exercised her option. What action could she have been expected to take before that time? And since the option had not been bargained for or expressly

documented in any of the agreements, she could not have been expected to contest its ownership. It is significant that in applying such an extraordinary doctrine as presumed grant through prescriptive easement, Justice Brice required the prescription be "open, uninterrupted, peaceable, notorious, adverse, under claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner." Id. at 504, 71 P.2d at 653. The majority opinion does not demonstrate how the actions of PWG meet these requirements.

The Texas law cited by the majority is similar. It requires three elements in order for a presumption of grant to arise: (1) "long asserted and open claim, adverse to the apparent owner, ... (2) non-claim by the apparent owner, ... [and] (3)

acquiescence by the apparent owner in the adverse claim." Magee v. Paul, 110 Tex. 470, 221 S.W. 254, 256 (1920) (quoting from the majority). I can find no evidence in the record which demonstrates that PWG openly asserted a claim for any period of time. The only evidence in the record demonstrates that Roseline claimed her interest in the option as soon as she became aware that she could claim it.

I see no reason to apply the doctrine of presumed grant. Without it, there is no assignment, conveyance or any divesting action by Roseline. She exercised her option in October of 1989 and had no reason to take any other action until that time. I would reverse and set aside the judgement of the District Court because to do otherwise gives PWG a valuable interest that they never contracted or bargained for. For

all of the above reasons, I dissent.

APPENDIX - B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

January 3, 1994

No. 20,210

EL PASO PRODUCTION COMPANY, et al.,

Plaintiffs-Appellees and Cross-appellants,

vs.

PWG PARTNERSHIP, et al.,

Defendants-Appellees,

vs.

STEVE J ABRAHAM, personal representative of the estate of Roseline Abraham, and STEVE J. ABRAHAM, MICHAEL C. ABRAHAM, and DIAN ABRAHAM HENKLE, individually and as surviving children of Roseline Abraham, deceased,

Defendant-Counterclaimants-Appellants and Cross-appellees.

ORDER

This matter coming on for consideration by the Court upon appellant's motion for rehearing and brief in support thereof and

motion for leave to file amicus curiae brief, brief in support of said motion, motion to strike motion for leave to file amicus curiae brief, and brief in support of said motion and the court having considered the motions and supporting briefs and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that both motions hereby are DENIED by the Full Court, participating per request of movants.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MANDATE NO. 20,210

TO THE DISTRICT COURT sitting within and for the County of San Juan, GREETINGS;

WHEREAS, in cause number CV 89-822 your civil docket, wherein El Paso Production Company, et al. were Plaintiffs, PWG Partnership, et al. were defendants, Steve J. Abraham, et al. were defendants and

counterclaimants, declaratory judgment was entered against the Abraham family and an amended judgment was entered that reduced a sanction for contempt of court; and

WHEREAS, the cause and judgment were afterwards brought by the Abraham family into this Court for review by appeal and by plaintiffs for review by cross-appeal, whereupon such proceedings were had that on December 1, 1993, an opinion was entered affirming the declaratory judgment and reversing the amended judgment concerning sanctions for contempt of court.

NOW THEREFORE, this cause is remanded to you for entry of judgment that conforms to the findings of fact consistent and in conformity with the opinion of this Court.

WITNESS, The Hon. Richard E. Ransom, Chief Justice of the Supreme Court of the

State of New Mexico, and the seal of said Court this 3rd day of January, 1994.

_____

Kathleen Jo Gibson, Chief Clerk of the
Supreme Court of the State of New Mexico

APPENDIX - C

IN THE DISTRICT COURT OF

SAN JUAN COUNTY, NEW MEXICO

EL PASO PRODUCTION COMPANY,
AND EL PASO NATURAL GAS
COMPANY,

Plaintiffs,

MERIDIAN OIL, INC,

Involuntary Plaintiffs,

v. No. CV-89-822

PWG PARTNERSHIP, et al.,

Defendants.

ELEVENTH JUDICIAL DISTRICT

STIPULATED FINAL JUDGMENT
ON ACCOUNTING PHASE

This matter having come before the Court for trial on the merits on September 9, 1991, on the following issues, among others: (1) the date of maturity of the option to repurchase in Article VII, Section 2 of the Oil and Gas Lease Sale Agreement between Mike Abraham, et ux. and El Paso

Natural Gas Company dated September 19, 1952, referred to in this litigation as "GLA-59"; (2) if the option to repurchase were determined to have matured prior to the date of trial, the entitlement of PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production, Inc., Prudential Bache Energy Income Production Partnership, IIP-10, Prudential Bache Energy Income Production Partnership, IIP-11, Prudential Bache Energy Income Production Partnership, IIIP-12, Prudential Bache Energy Income Production Partnership, IIIP-13, Prudential Bache Energy Income Production Partnership, IIIP-14, Prudential Bache Energy Income Production Partnership, IIIP-15, Prudential Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, Freeport-McMoRan Inc. (hereafter "PWG Defendants"),

to specific performance of the option to repurchase; (3) the accounting, if any, owed by Plaintiffs, El Paso Natural Gas Company, El Paso Production Company, and Involuntary Plaintiff, Meridian Oil Inc. (hereinafter "El Paso") to the PWG Defendants from and after the date of maturity of the option to the date of judgment herein; and (4) the damages, if any, to be awarded to PWG Defendants for any period between the date of maturity of the option and the date of judgment.

At the commencement of the trial September 9, 1991, the Court announced its ruling in open court concerning the meaning of certain language in the repurchase option. El Paso and the PWG Defendants have agree, as between them, to the entry of this Stipulated Partial Judgment adjudicating the date of maturity of the option to repurchase

in accordance with the ruling of the Court. El Paso and the PWG Defendants have further agreed to settle as between themselves all further issues in controversy between them in this litigation, pursuant to the terms of a letter agreement dated September 18, 1991 which El Paso and the PWG Defendants have agreed shall remain confidential.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As between the PWG Defendants and El Paso, the conditions necessary for maturation of the option to repurchase contained in Article VII, Section 2 of GLA-59 occurred as of January 15, 1989, and the option to repurchase was subject to exercise by the PWG Defendants at that time. This does not apply as between El Paso and Defendants Steve Abraham as Personal Representative of the Estate of Mike

Abraham, Roseline Abraham, J.R. and Dorothy Abraham (hereinafter "Abraham Defendants").

2. El Paso and the PWG Defendants have released, and by agreement to entry of this Stipulated Partial Judgment do release one as against the other, and the Court therefore hereby dismisses with prejudice, all disputes, claims, and defenses asserted in this litigation by El Paso against the PWG Defendants and the PWG Defendants against El Paso. This release and dismissal includes any and all claims through September 30, 1991, asserted by the PWG Defendants in this litigation against El Paso for an accounting or concerning the methodology utilized by El Paso in accounting for production from the GLA-59 property, including without limitation claims set forth in the pleadings, pretrial order, scheduling orders, or in arguments to

the Court relating to: (1) accounting for volumes, revenues, and costs; (2) allocation of unit production; and (3) pricing.

3. El Paso and the PWG Defendants reserve, save, and maintain all legal theories, claims, rights to court costs, and defenses as against all claims or defenses by the Abraham Defendants.

4. Upon entry of this Stipulated Final Judgment on Accounting Phase, all issues as to all parties have been adjudicated.

_____
DISTRICT JUDGE PRO TEMPORE

APPROVED:

/s/_____
Attorney for Plaintiffs

/s/_____
Attorney for New PWG Partnership
and Graham Royalty Limited

/s/_____
Attorney for Freeport McMoRan, Inc.

APPENDIX - D

IN THE DISTRICT COURT OF SAN JUAN COUNTY, NEW MEXICO

No. CV 89-822

EL PASO PRODUCTION COMPANY, NATURAL GAS COMPANY,

Plaintiffs,

MERIDIAN OIL INC.,

Involuntary Plaintiff,

vs.

PWG PARTNERSHIP, GRAHAM ROYALTY, Ltd., PRUDENTIAL-BACHE ENERGY PRODUCTION INC., PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIP-10, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIP-11, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-12, PRUDENTIAL-BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-13, PRUDENTIAL BACHE ENERGY INCOME PRODUCTION PARTNERSHIP IIIP-14,

Entered in Open Courtat 4:30 o'clock p.m., this 18th day of September, 1991.

Leon Karelitz
District Judge Pro Tempore

PRUDENTIAL-BACHE
ENERGY INCOME PRODUCTION
PARTNERSHIP IIIP-15,
PRUDENTIAL-BACHE ENERGY
INCOME LIMITED PARTNERSHIP
IVP-16, PRUDENTIAL-BACHE
ENERGY INCOME LIMITED
PARTNERSHIP IVP-17, FREEPORT-
McMoRAN INC., ROSELINE
ABRAHAM, STEVE J. ABRAHAM
as Personal Representative
of Mike Abraham, Deceased,
J. R. ABRAHAM, and
DOROTHY ABRAHAM,

Defendants.

JUDGMENT ON OWNERSHIP PHASE

This case was tried to the Court, sitting without a jury, and the Court thereafter on August 20, 1991 having filed its Decision on Ownership Phase, it is

ORDERED, ADJUDGED AND DECREED, that:

1. Defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income

Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc. have lawful possession and since 1973 have had and continue to enjoy perfect and full legal title to all Seller's interests in GLA-59, including but not limited to the option to repurchase mentioned in Article VII, Sec. 2 therein, applicable to the leases hereinafter in this decretal clause recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF 079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 079002, NM 012735,

and SF 079012. "GLA-59" is that certain Oil and Gas Lease Agreement dated September 19, 1952, entered into between Mike Abraham and defendant Roseline Abraham, his wife, as Seller, and plaintiff El Paso Natural Gas Company. All aforementioned leases are United States Government Oil and Gas Leases; leases numbered SF 079380 and SF 079381 are situated in San Juan County, New Mexico, and all eight additional lease are situated in Rio Arriba County, New Mexico; all as more fully described hereafter:

Lease No.	Description	Acreage	Gross	County
SF 079380	T32N-R8W, Section 14: S/2		320.00	San Juan
	Section 15: SE/4		160.00	
	Section 22: All		640.00	
	Section 23: All		640.00	
			1,760.00	
SF 079381	T32N-R8W, Section 24: E/2		320.00	San Juan
	Section 25: E/2		320.00	
	Section 33: E/2		320.00	
	Section 34: All		640.00	
	Section 35: All		640.00	
			2,240.00	
SF 079382	T30N-R7W, Section 22: E/2E/2		160.00	Rio Arriba
	Section 23: All		640.00	
	Section 24: All		640.00	
	Section 25: All		640.00	
			2,080.00	

SF 079383	T30N-R7W, Section 26: All	640.00	Rio Arriba
	Section 27: E/2	320.00	
	Section 34: All	640.00	
	Section 35: All	640.00	
		2,240.00	
SF 080713B	T30N-R6W, Section 14: All	640.00	Rio Arriba
	Section 15: S/2, S/2 NW/4	400.00	
		1,040.00	
SF 080714A	T30N-R6W, Section 10: Lots 1-5, N/2, W/2 SW/4	518.69	Rio Arriba
	Section 15: Lots 1, 2, NE/4 NE/4, S/2 NE/4, NW/4 NW/4	223.96	
		742.65	
NM 012292	T30N-R6W, Section 3: All	640.48	Rio Arriba
SF 079002	T30N-R6W, Section 7: N/2	320.00	Rio Arriba
	Section 8: N/2, SE/4	480.00	
		800.00	
NM 012735	T30N-R6W, Section 6: All	639.40	Rio Arriba
SF 079012	T30N-R6W, Section 4: All	639.40	Rio Arriba
	TOTAL ACREAGE	12,822.37	

2. Neither defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Co. nor Involuntary Plaintiff Meridian Oil Inc. has any right, title, interest,

claim demand or lien in, to or upon any of the Seller's interests under GLA-59 in any of the ten leases enumerated in Decretal Clause No. 1 above; and neither Mike Abraham, deceased, defendant Roseline Abraham, Defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham nor defendant Dorothy Abraham has had any such right, title, interest, claim, demand or lien therein or thereto since before September, 1964.

3. The foregoing title of defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production

Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc., in and to all Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above, be, and the same hereby is, forever quieted and set at rest against the claims, demands and pretensions of defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Company and Involuntary Plaintiff Meridian Oil Inc., and each of them, and of all persons claiming or to claim from or

through them, or any of them, and defendant Roseline Abraham, defendant Steve J. Abraham, as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Co. and Involuntary Plaintiff Meridian Oil Inc., and each of them be, and they hereby are, barred and forever estopped from having or claiming to have any right, title, interest, claim, demand or lien whatsoever in, to or upon said Seller's interests in GLA-59, or any part thereof, adverse to defendants PWG Partnership, Graham Royalty, Ltd., Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income

Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, and Freeport-McMoran Inc.; and the lawful possession and full perfect legal title of the defendants first hereinabove named in this decretal clause in and to all Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, and every part thereof, be, and the same hereby are, established against the adverse claims of defendant Roseline Abraham, defendant Steve J. Abraham as Personal Representative of Mike Abraham, Deceased, defendant J. R. Abraham, defendant Dorothy Abraham, plaintiff El Paso Production Co., plaintiff El Paso Natural Gas Company and

Involuntary Plaintiff Meridian Oil Inc., and each of them.

4. As between themselves, defendant PWG Partnership owns an undivided 33.3325 percent in and to the Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above; defendant Graham Royalty, Ltd. and defendants Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15, Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17, own an

undivided 33.3325 percent; and defendant Freeport-McMoran Inc., owns the remaining undivided 33.3350 percent.

5. During the course of this proceeding, defendant Freeport-McMoran Inc. duly and lawfully sold and conveyed its undivided 33.3350 percent in and to the Seller's interests in GLA-59, enumerated in Decretal Clause No. 1 above, to plaintiff El Paso Production Co. (to the extent of an 85 percent interest) and to Meridian Oil Production Inc., affiliated with Involuntary Plaintiff Meridian Oil Inc. (to the extent of 15 percent).

6. All right, title and interest of defendant J. R. Abraham and defendant Dorothy Abraham, his wife, in an to all Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, in and to the United States Government Oil and Gas

Leases SF 079382 and SF 079383, be, and they hereby are, divested from defendant J. R. Abraham and defendant Dorothy Abraham, his wife, and all such right, title and interest in and to the Seller's interests in GLA-59, as enumerated in Decretal Clause No. 1 above, in and to such leases SF 079382 and SF 079383 be, and they hereby are, vested in defendant PWG Partnership (an undivided 33.3325 percent), in defendants Graham Royalty, Ltd. and Prudential-Bache Energy Production Inc., Prudential-Bache Energy Income Production Partnership IIP-10, Prudential-Bache Energy Income Production IIP-11, Prudential-Bache Energy Income Production IIIP-12, Prudential-Bache Energy Income Production Partnership IIIP-13, Prudential-Bache Energy Income Production Partnership IIIP-14, Prudential-Bache Energy Income Production Partnership IIIP-15,

Prudential-Bache Energy Income Limited Partnership IVP-16, Prudential-Bache Energy Income Limited Partnership IVP-17 (an undivided 33.3325 percent), and in plaintiff El Paso Production Co. (85 percent of an undivided 33.3350 percent) and Meridian Oil Production Inc. (15 percent of an undivided 33.3350 percent). This decretal clause explicitly has no reference to the overriding royalty interest in leases SF 079382 and SF 079383 owned by defendant J. R. Abraham and defendant Dorothy Abraham or either of them.

7. This judgment is not final; this judgment shall be final only upon entry hereafter of a Stipulated Final Judgment on Accounting Phase.

_____

Leon Karelitz
District Judge Pro Tempore

Noted as to form:

/s/

/s/

/s/

/s/

APPENDIX - E

EXCERTS FROM
DECISION OF OWNERSHIP PHASE
(Filed August 10, 1991)

"Pursuant to Order Confirming Trial Setting and Settling Trial Procedure entered on June 14, 1991, all issues as to the ownership of GLA-59 rights (remaining after the court's disposition of summary judgment motions) were tried to the court, without a jury, commencing on July 8, 1991. On July 23, 1991, after all parties had rested and closed on the ownership issues, and after hearing and reading argument of all parties, the court gave, at length, to counsel and the record an oral opinion containing evidentiary and ultimate findings, its conclusions of law and reasoning. Having now also considered the requested findings of fact and conclusions of law submitted by

the parties, the court makes and states its findings and conclusions as follows:"

FINDINGS OF FACT

*****

"19.c. . . . On May 29, 1963, . . . Mike Abraham owned three things in the interests assigned to El Paso in the GLA-59 leases: First, the oil; second, the liquid hydrocarbons; and third, the right to buy back the gas production. The latter right (apart from any question of its characterization as a covenant running with the land) is a right to gas, a real right, is clearly assignable and also divisible under GLA-59 . . ."

*****

"20 . . . The conveyance listed within the oil and gas properties, which were being conveyed, six leases,

by number as follows: SF 080713B, SF 080714A, NM 012282, SF 079002, NM 012735, and SF 079012 . . ."

"21. Omitted from the conveyance of June 3, 1963 were leases SF 079380 and SF 079381; . . . Also omitted from that conveyance were . . . leases SF 079382 and SF 079383 . . ."

"32. . . . the PWG group has had long-continued possession and use of the seller's interests under GLA-59."

"43 . . . Roseline Abraham was not a named party to the bankruptcy proceedings."

*****

CONCLUSIONS OF LAW

*****

"3. The evidence affords a sufficient basis for, if it does not require, the court to invoke the policy presumption

of a grant into Rincon from Mike Abraham and defendant Roseline Abraham . . . of the seller's interests in GLA-59, specifically, the whole of the option to repurchase promised to be granted in Article VII, Sec. 2 and the oil and liquid hydrocarbons in leases SF 079380, SF 079381, SF 079382 and SF 079383. Such a conveyance might have been executed and its execution would be a solution of the difficulties arising from the nonexecution. The circumstances supporting the presumption of a grant, to quiet the possession of the PWG group, are here very cogent and full. The fact that Mike Abraham and Defendant Roseline Abraham in 1963 made one deed conveying some of the seller's interest under GLA-59 to Universal

Minerals, Inc., does not repel the presumption that they made another covering other seller's interests under GLA-59 to Rincon; the presumption assumes that all that might lawfully have been done to perfect legal title was in fact done, and in the form prescribed by law.

"4. The PWG group has lawful possession and has acquired by the 1973 conveyances form Rincon perfect title to all seller's interests in GLA-59, including but not limited to the option to repurchase mentioned Article VII, Sec. 2 therein, applicable to the leases hereinafter in this Conclusion recited, and to the oil and liquid hydrocarbons in and that may be extracted from such leases: SF 079380, SF 079381, SF

079382, SF 079383, SF 080713B, SF 080714A, NM 012292, SF 079002, NM 012735, and SF 079012."

APPENDIX - F

STATUTES

30 U.S.C. § 181. **Lands subject to disposition; persons entitled to benefits;**

"Deposits of . . . oil . . . or gas, and lands containing such deposits owned by the United States . . . Shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States . . ."

30 U.S.C. § 189. Rules and regulations . . .

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any

structure, or oil and gas field, for the purpose of this chapter. . ."

(Feb. 25, 1920, c. 85, § 32, 41 Stat. 450)

30 U.S. C. § 226 **Lease of oil and gas lands.**

"(a) Authority of Secretary

All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.

*****

"(j) Cooperative or unit plan; authority of Secretary of the Interior to alter or modify; communitization or drilling agreements; term of lease, conditions; Secretary to approve operating, drilling, or development contracts, and subsurface storage

For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, filed, or like area, is then subject to any cooperative or unit plan of development or operation) lessees thereof and their representatives may unite with each other or jointly or separately under others, in collectively adopting and operating under a cooperative unit plan of developtment or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his

discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, reproducing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this chapter shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under

which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States . . .

*****"

ACT OF AUGUST 8, 1946

"Sec. 5 The Act is hereby amended by adding a new section to read as follows;

Section 17. (b) For the purpose of more properly conserving the natural resources of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of said oil or gas pool, field, or like area, is then subject to any cooperative or unit plan of development or operation), lessees thereof and their representatives may

unite with each other, or jointly or separately with others, in collectively adopting and operating under a cooperative or unit plan of development or operation of such pool, field, or like area, or any part thereof, whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary is thereunto authorized, in his discretion, with the consent of the holders of leases involved, to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of such leases and to make such regulations with reference to such leases, with like consent on the part of the lessees, in connection with the

institution and operation of any such cooperative or unit plan as he may deem necessary or proper to secure the proper protection of the public interest. The Secretary may provide that oil and gas leases hereafter issued under this Act shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States.

"Any plan authorized by the preceding paragraph, which includes lands owned by the United States, may, in the discretion of the Secretary, contain a provision whereby authority

is vested in the Secretary of the Interior, or any such person, committee, or State or Federal officer or agency as may be designated in the plan, to alter or modify from time to time the rate of prospecting and development and the quantity and rate of production under such plan. All leases operated under any such plan approved or prescribed by the Secretary shall be excepted in determining holdings or control under the provisions of any section of this Act.

*****"

REGULATIONS

43 C.R.R. § 3186.1 **Model onshore unit agreement . . .**

*****

"8. RIGHTS AND OBLIGATIONS OF UNIT OPERATOR. Except as otherwise specifically provided herein, the exclusive right, privilege, and duty of exercising any and all rights of the parties hereto which are necessary or convenient for prospecting for, producing, storing, allocating, and distributing the unitized substances are hereby delegated to and shall be exercised by the Unit Operator as herein provided. . .

*****"

IN EFFECT IN 1952 AND 1953

"COOERATIVE CONSERVATION PROVISIONS

192.20 **Cooperative or unit plans.** The act authorizes lessees and their representatives to unite with each other, or jointly or separately with others, in collectively adopting and

operating under a cooperative or unit plan of development or operation of any oil or gas pool, field, or like area, or any part thereof (whether or not any part of such pool, field, or like area is then subject to any coopertaive or unit plan of development or operation). The agreement must be for the purpose of more properly conserving the natural resources of any such oil or gas pool, field or area covered thereby and must be determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. The Secretary, with the consent of the lessees, is authorized to establish, alter, change, or revoke drilling, producing, rental, minimum royalty, and royalty requirements of

the leases and to make such regulations with reference to such leases as he may deem necessary or proper to secure the protection of the public interest. All leases committed to any unit or cooperative plan approved or prescribed by the Secretary of the Interior shall be excepted in determining acreage charges.

§ 192.21 **Application for approval of plan.** The procedure in obtaining approval of a cooperative or unit plan of development including suggested text of an agreement acceptable to the Department is contained in 30 C.F.R. Part. 226, 'Unit or Cooperative Agreement'. All applications to unitize and all documents incident thereto shall be filed in the office

of the oil and gas supervisor, Geological Survey, for the region in which the unit area is situated."

APPENDIX - G

The following is the pertinent excerpt from the conveyance of Rincon to PWG:

"6. An undivided 50% leasehold interest in that certain Oil and Gas Lease, Serial No. SF 080713-B dated from the United States of America, as Lessor to Oscar Abraham, as Lessee covering the following described lands:

Township 30 North, Range 6 West, N.M.P.M.
Section 14: All
Section 15: S/2, S/2 NW/4
Containing 1,040.00 acres, more or less.

Net Interest in Production:
W.I.
.41250000

7. An undivided 50% leasehold interest in that certain Oil and Gas Lease, Serial No. SF 080714-A dated from the United States of America, as Lessor to Oscar Abraham, as Lessee covering the following described lands:

Township 30 North, Range 6 West, N.M.P.M.

Section 10: Lots 1, 2, 3, 4, 5, N/2, W/2 SW/4
Section 15: Lots 1 and 2, S/2 SE/4, NE/4 NE/4

NW/4 NW/4
Containing 742.65 acres, more or less

*****

Properties No. 5, 6, and 7 are subject to the terms and provisions of an Oil and Gas Lease Sale Agreement between Mike Abraham and El Paso Natural Gas Company dated September 19, 1952 wherein Mike Abraham, et ux, assigned their interest therein to El Paso Natural Gas Company subject to (a) the reservation of all oil rights; (b) the reservation of all gaseous liquids; and (c) the terms and provisions of that certain Agreement between Mike Abraham and General American Oil Company of Texas dated August 24, 1951."

APPENDIX - H

The following excerpts are from testimony presented at the trial:

(Witness) W.H. Hudson:

TR. 1364;

"Q. Now, you've said that your interest would have been to get as much as you could in, because any value in equity in the reorganized company, in excess of the loan, you would be able to share in, as I understand it, because you would have an ownership position in that reorganized (country) -- company.

Q. Do I understand you there?

A. That is correct.

Q. Would Ms. Fuller, Mr. Avant, Mr. Barnett also have been aware of that interest of your company?

A. Absolutely.

Q. They would be aware that it's your intention to make sure that everything that was supposed to be in that reorganized company in fact was in it?

A. That is correct.

Q. And in this transaction specifically, the list of properties, of course, is a lengthy one. Would Ms. Fuller have had the initial responsibility for putting that together?

A. In my estimation, yes."

TR 1398;

"Q. I believe that you answered Mr. Slade's questions, and I want to make sure I understand this, that the objective of getting the

Abraham properties into Universal Minerals, later named "Rincon," was complied with the Exhibit 174?

A. Correct.

Q. And that if anything that was left out that was ever called to your attention, and nothing was done about it, it would have been because it was of no value, or it was de minimums; is that correct?

A. That it correct.

(Witness) Billie Fuller:

TR 1414;

Q. But let me ask you this questions, Ms. Fuller: The last sentence there in the third paragraph states that to the best of your knowledge, a request for

assignment will not be made at this time. Do you have any recollection of a request for assignment ever being made after that?

A. No, sir.

Q. All right. The last sentence states, (quote) "The records show that the entire interest in these four leases is held by El Paso Natural Gas Company" (end of quote). Do you recall taking -- taking any action pursuant to that statement, after you received the letter?

A. No. sir.

Rincon correspondence dated November 18, 1993:

Exhibit 41;

1126 MERCANTILE SECURITES BUILDING
DALLAS 1, TEXAS
18 November 1963

Mr. Henry Samaniego, Supervisor
Record Section - Land Department
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas

Dear Mr. Samaniego:

Thank you for your letter of November 15, 1963.

We enclosed electrostat copy of a fully executed copy of the mortgage and all of its exhibits by and between Rincon Oil & Gas Corporation to Chemical Bank New York Trust Company. We were under the impression that the attorneys had furnished this instrument to you, an regret that you have been delayed in receiving it.

None of the interests in SJ 32-8 Unit were assigned so far as we can determine. It was the intent that all

of Mike Abraham's properties be assigned, but this was overlooked in some way. To the best of my knowledge, request for assignment will not be made at this time.

There is still pending for approval before the BLM an assignment of a working interest in SF 079007 from Abraham to Universal, as wellaas an assignment of a 25% interest in Lot 1 (NW1/4NW1/4) of Section 18, 32N, 13W, under the same lease from the Peoples State Bank of Ellinwood, Kansas. If there are other federal leases on wich we have not furnished copies of the approved assignments, we do not know which ones they might be, as we thought all had been furnished except SF 079007. If you have knowledge of

any leases on which assignments are lacking, will you please advise.

Very truly yours,

RINCON OIL & GAS CORPORATION

/s/
Billie Fuller

BF..s
encl."

El Paso Natural Gas Company correspondence:

Exhibit 49;

"May 1, 1964

Rincon Oil & Gas Corporation
1126 Mercantilo Securities Building
Dallas 1, Texas

Attention: Mr. J.A. Barnett

Re: San Juan 30-6 Unit,
Tracts #9 and #10
Rio Arriba County, New Mexico

Gentlemen:

Please refer to your letter of April 13, 1964, concerning payout statements that you are receiving

convering the captioned tracts. Our records indicate that you do not own an interest in these tracts; however, since costs and production attributable to these tracts are included in the payout account contemplated by the June 22, 1951 Agreement between Mike Abraham and General American, it is necessary that we show these tracts on the statement. Attached is a copy of the June 22, 1951 Agreement.

Yours very truly,

Henry Samaniego
Supervisor
Record Section
Land Department

HS:DI:vkr
Attachment

NM-2104
NM-2105

APPENDIX - I

New Mexico Statutes

1. NMSA 1978:

"40-3-13. Transfers, conveyances, mortgages and leases of real property; when joinder requires.

A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey, or mortgage any interest in community real property and separate real property owned by the spouses as co-tenants in joint tenancy or tenancy in common. . .

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real

property or in separate real property owned by the spouses as co-tenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.

Except as provided above, either spouse may transfer, convey, mortgage or lease separate real property without the other's joinder. . ."

*****

2. NMSA 1953:

"57-4A-7. Transfers, conveyance, mortgages and leases of real property - When joinder required. - A. Except for purchase-money mortgages and

except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property and separate real property owned by the spouses as co-tenants in join tenancy or tenancy in common. . .

Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lese any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect, except that either spouse

may transfer, convey, mortgage or lease directly to the other without the other joining therein.

B. Nothing in this section shall affect the right of one of the spouses to transfer, convey, mortgage or lease, or contract to transfer, convey, mortgage or lease, any community real property, or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, without the joinder of the other spouse, pursuant to a validly executed and recorded power of attorney as provided in section 70-1-6 NMSA 1953."

3. 70-1-6:

"**Powers of attorney and revocations thereof to be acknowledged and recorded.** - All powers of attorney

or other writings containing authority to convey real estate, as agent or attorney of the owner of the same, or to execute, as agent for another, any conveyance of real estate, or by which real estate may be affected in law, or equity, shall be acknowledged, certified, filed and recorded, as other writings conveying or affecting real estate are required to be acknowledged . . ."